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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. —

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER of IMMIGRATION AND NATURALIZATION, PETITIONERS

v.

MARIE ELIZABETH EIG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled case on August 1, 1938 (R. 39), affirming the judgment of the District Court of the United States for the District of Columbia (R. 26).

OPINIONS BELOW

The opinions of the District Court (R. 25–26) and the Court of Appeals (R. 31–39) have not been reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered August 1, 1938 (R. 39). On October 15, 1938, a motion by respondent for leave to file motion to amend the decree of the Court of Appeals was filed (R. 41). This motion was denied on October 19, 1938, "on the ground that the object sought by the proposed motion is fully taken care of in the original opinion" (R. 41). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a native-born citizen of the United States, residing with her father in a foreign state while a minor, lost her American citizenship when she became a citizen of such foreign state through the naturalization of her father therein during her minority.

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

These are set forth in Appendix A, *infra*, pp. 16–19.

STATEMENT

This case arises on the pleadings—the respondent's bill of complaint and exhibits and a motion by the defendants to dismiss. The facts as stated in the bill of complaint and accompanying exhibits may be briefly summarized as follows:

Respondent's father, a Swedish immigrant, became a naturalized citizen of the United States on September 24, 1906 (R. 10a). Respondent was born October 2, 1907, in New York City (Ex. A, R. 8). In 1911 the respondent was taken to Sweden by her mother (R. 2, 10a, 15). On July 25, 1922, respondent's father returned to Sweden, where he has since continued to reside (R. 15, 19). In a communication dated October 30, 1934, from the Swedish Ministry for Foreign Affairs to the American Legation at Stockholm, it was stated that the respondent's father reacquired Swedish nationality by resuming his residence in Sweden and remaining there for a period of two years, and that respondent likewise acquired Swedish nationality under Swedish law if she were residing with him at the time (R. 16–17).[1] Respondent resided with her father from the time he returned to Sweden in 1922 until she came to this country on a passport obtained from the Department of State on July 22, 1929[2] (R. 2–3).

Following the issuance of this passport, respondent arrived in this country on September 17,

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[1] In a report dated November 17, 1934, accompanying this communication (R. 16), the United States Consul at Göteberg, Sweden, stated that the respondent's father resumed Swedish citizenship automatically on July 25, 1924 (two years after he had arrived in Sweden to establish a permanent residence), that since respondent was residing with him at that time, she acquired Swedish nationality, and that both lost their American citizenship by virtue of Section 2 of the Act of March 2, 1907 (*infra*, p. 16) (R. 19–20).

[2] The Secretary of State informed the Attorney General in a letter dated January 21, 1937, that the issuance of this passport was the result of a "clerical inadvertence."

1929 (R. 3). On April 8, 1935, the Immigration and Naturalization Service of the United States Department of Labor wrote her that, following an investigation of her case, it had concluded that she lost her American citizenship and became a Swedish subject when her father became such on July 25, 1924; that, being an alien, her entry on September 17, 1929, could not be regarded as a lawful one for permanent residence since she was then subject to the quota laws and was not in possession of an immigration visa; that it was therefore necessary for her to depart from the United States and thereafter effect an entry in compliance with the existing immigration laws; and that the Service would afford her reasonable opportunity to adjust her present unlawful status. She was also requested to advise the Service when it was her intention to depart from the United States (R. 13). As a result of her protest the Secretary of Labor and the Acting Commissioner of Immigration and Naturalifiation suspended action temporarily, the District Director at Ellis Island being instructed to take no steps looking to the enforced departure of the respondent prior to February 1, 1937, but the Department of Labor nevertheless insisted upon the validity of its holding that the respondent was illegally in the United States and took no action to terminate its threat of deportation (R. 3–4, 14).

On July 16, 1936, the respondent applied to the State Department for a passport as an American citizen (R. 4; Ex. G, R. 14a–14b), but such passport

was refused on July 29, 1936, on the ground that the respondent could not be considered a national of the United States (R. 4, 15–17).

Thereafter, on January 14, 1937, the respondent filed in the United States District Court for the District of Columbia a bill of complaint naming as defendants the Secretary of Labor, the Acting Commissioner of Immigration and Naturalization, and the Secretary of State (R. 1–21). She prayed for a judgment under the Declaratory Judgment Act of June 14, 1934, as amended, declaring that she is a native-born citizen of the United States and is entitled to all the rights and privileges of a citizen of the United States. She also sought to enjoin the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization from instituting and from continuing to prosecute proceedings for the purpose of deporting her from the United States or from in any way interfering with her residence therein. She further prayed that an injunction should be issued against the Secretary of State directing him to refrain from making any statements to the effect that she is not a citizen of the United States and from refusing to issue her a passport on the ground that she is not such a citizen. Finally, a temporary injunction was sought against the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization to restrain them from taking any action looking toward the deportation of the respondent until final judgment had been rendered in the suit (R. 6).

A rule to show cause why the temporary injunction should not be granted was issued (R. 20). A return to the rule to show cause was filed (R. 21–22), which stated, among other things, that the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization had no intention to enforce deportation proceedings pending the outcome of the case (R. 21). In view of this statement the rule to show cause was discharged (R. 22).

Thereafter a motion to dismiss the bill of complaint was filed by the defendants (R. 23–24). The District Court on November 18, 1937, entered judgment sustaining the motion to dismiss as to the Secretary of State, overruling it as to the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization and, these defendants having elected to stand upon their motion to dismiss, declaring the respondent to be a natural-born citizen of the United States (R. 26). In its opinion (R. 25–26) the court ruled, in sustaining the motion to dismiss as to the Secretary of State, that it would not undertake by mandamus to compel the issuance of a passport nor to control, by means of a declaratory judgment, the action of one whose function it is to consider and decide whether or not a passport should be issued. With reference to the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization the court held that the respondent was entitled to a declaratory judgment, that she is a citizen of the

United States, for the reason that "I do not think that the fact that her father may have become a citizen of Sweden, can deprive her of her rights as a native born citizen of the United States, even though under the laws of Sweden she may be treated in that country as a citizen of it". (R. 25–26).

On appeals by all parties to the Court of Appeals for the District of Columbia (R. 26–28) the decision of the lower court was in all respects affirmed (R. 31–39). Accepting for the purpose of decision the Government's interpretation of the Swedish laws to the effect that the respondent's father had become repatriated at the end of two years after his return to Sweden for permanent residence and that because of the father's repatriation the respondent had also become a Swedish citizen (R. 35),[3] the court refused to hold that by virtue of Section 2 of the Act of March 2, 1907, *infra*, p. 16, which provides that any American citizen shall be deemed to have expatriated himself when he has become naturalized in any foreign state in conformity with its laws, the respondent had likewise lost

[3] The Government's version of the Swedish law was based upon a translation thereof appearing in "Consular Statute Book of Sweden," published in Stockholm in 1910. It was stipulated in the District Court that the court for the purpose of the motion to dismiss the bill of complaint "may take judicial notice of the statutes of Sweden as the same appear in the English translation" in the book referred to as well as in "Statute Book for Legations and Consulates", dated 1931. The respondent cited to the court below the translation in the latter book (R. 35). (R. 25).

her American citizenship. The court held in effect that even if the respondent became a naturalized Swedish citizen during her minority in that country she had what is known in international law as double citizenship, that upon attaining her majority she had the right to elect to retain her American citizenship by returning to this country, and that she exercised such election when, after becoming *sui juris*, she applied for and received her passport to come to this country. The court also held that the doctrine of election followed from the fundamental rule that a natural born citizen of the United States retains his citizenship until he changes it himself in due form and voluntarily becomes a citizen of some other country, that the change can neither be worked by the father nor by the sovereignty into which the child involuntarily is taken, for under the English and American doctrine the child himself acquires rights and owes fealty besides that which attaches to the father, that neither the Act of March 2, 1907, nor any other statute had taken away or diminished those rights, and that "it is doubtful, indeed, if there is any power in Congress, in view of the provisions of the Fourteenth Amendment, to take them away" (R. 35–37).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the respondent had not lost her American citizenship.

2. In holding that the respondent did not become expatriated by virtue of Section 2 of the Act of March 2, 1907, c. 2534, 34 Stat. 1228, when considered in connection with the Swedish Nationality Law of 1894, as amended.

3. In holding in effect that the Act of 1907 would be of doubtful constitutionality, if so construed.

4. In failing to hold that the Convention of 1872 between the United States and Norway and Sweden, when read in connection with the Swedish law, accomplished the respondent's expatriation.

5. In holding that if the respondent became a naturalized citizen of Sweden during her minority residence therein, dual citizenship resulted and that she had the right when she reached her majority to elect to retain her American citizenship by returning to this country.

6. In affirming the judgment of the District Court overruling the petitioners' motion to dismiss the bill of complaint and declaring the respondent to be a natural-born citizen of the United States.

REASONS FOR GRANTING THE WRIT

(1) The decision below is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Reid,* 73 F. (2d) 153 (C. C. A. 9th), certiorari denied, 299 U. S. 544, because the petition was not filed in time. In that case the petitioner, a native-born American, was taken to Canada as a child by her father, who be-

came a naturalized British subject. She married a Canadian citizen while she was a minor and, after attaining majority, returned to the United States, where she sought repatriation under a statute facilitating the naturalization of women who had lost their citizenship by marriage to aliens. Opposing her petition, the Government contended that she did not come within the statute, for the reason that prior to her marriage she had lost her citizenship through her father's naturalization under a Canadian statute which provided that children take on the nationality of a naturalized subject and that a treaty between the United States and Great Britain recognized the British nationality of Americans naturalized according to the laws of the dominions. On appeal the Circuit Court of Appeals for the Ninth Circuit reversed an order of the District Court admitting the petitioner to citizenship, holding that the petitioner became a naturalized citizen of Canada and Great Britain by the naturalization of her father while she was a minor residing with him in Canada and that such naturalization terminated her American citizenship, with the result that she did not come within the terms of the statute under which she sought repatriation. In its opinion the court stated (pp. 155–156):

> For the courts of the United States to treat the petitioner as an American citizen instead of a British subject after the naturalization of her father in 1907, would be to expressly violate the terms of the treaty of

1870 with Great Britain, which required her to be treated by the United States "in all respects and for all purposes as a British subject" from and after that date.

* * * * * *

It cannot be seriously contended that naturalization of the citizens of the contracting powers is not within the treaty-making power of a nation. * * *

* * * * * *

The United States has consistently adhered to the principle that the naturalization of a parent effects the naturalization of a minor child residing with the parent. * * *

* * * * * *

The state department has consistently adhered to this view in dealing with foreign governments concerning the rights of minors naturalized in this country by the naturalization of the father, and vice versa. * * *

* * * * * *

We think that the purpose of the treaty of 1870 with Great Britain, and of the laws enacted in pursuance thereof by both contracting powers, or implicitly recognized thereby was to do away with all cases of dual citizenship arising from the operation of the naturalization laws of the two contracting powers, and that in the case of petitioner there never was such dual citizenship. * * *

(2) The decision below is also contrary to the opinion of the Attorney General dated June 16, 1932, and addressed to the Secretary of Labor, in *Citizenship of Ingrid Therese Tobiassen,* 36 Op.

Atty. Gen. 535. In this case the Attorney General held that Miss Tobiassen, a minor, who was born in the United States and whose father, after becoming a citizen of the United States by naturalization, took her to Norway, his native country, where he established and thereafter maintained a permanent residence, had acquired Norwegian nationality through the naturalization of her father as a Norwegian subject, and consequently ceased to be an American citizen. This opinion has not been superseded by any later opinion.

(3) The Court of Appeals in the instant case recognized in its opinion that its views were contrary to those expressed in the *Reid* and *Tobiassen* cases, when it said (R. 37–38):

> We have carefully examined the opinion of the Attorney General in *Tobiassen's* case, 36 Op. 535, and the case of *United States* v. *Reid*, 73 F. (2d) 153 (certiorari denied on the sole ground that the petition was not filed in time, 299 U. S. 544), upon which appellants rely; and we think that the arguments they make out are not supported by the statute on which they are mainly built, and likewise that the conclusions reached are opposed to the established rules and principles which, it seems to us, not only should apply but since the adoption of the Constitution have been applied.[4]

[4] The court below made no distinction between the instant case and the *Reid* and *Tobiassen* cases on the basis of any difference in substance between the treaties and foreign

(4) The view of the legislative branch of the Government appears also to be opposed to the decision below. This is indicated by the Act of June 25, 1938 (Private, No. 751, 75th Cong., 3d Sess.), which authorized the naturalization of one Albin H. Youngquist. This Act provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in the administration of the immigration laws Albin H. Youngquist, a native-born citizen of the United States who involuntarily lost his citizenship at the age of five years by reason of the naturalization of his father as a citizen of Canada, shall be held and considered to have been legally admitted to the United States for permanent residence.
>
> SEC. 2. Notwithstanding any other provision of law, said Albin H. Youngquist may be naturalized as a citizen of the United States by filing a declaration of intention and taking the oath of allegiance in the manner prescribed in the naturalization laws before any court having jurisdiction of the naturalization of aliens.[5]

In the report of the Senate Committee on Immigration which accompanied the bill (Senate Re-

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statutory provisions involved. Indeed, in the *Tobiassen* case the same treaty provisions were involved as are applicable in the present case.

[5] A similar private statute was passed in respect of one James Lincoln Hartley (Act of July 13, 1937, c. 493, 50 Stat., pt. 2, p. 1030).

port No. 1613, 75th Cong., 3d Sess.), it was stated (p. 1):

> * * * The action of the father in becoming a citizen of Canada had the effect of investing the son with that citizenship, and Albin Youngquist therefore lost his United States citizenship under section 2 of the act of March 2, 1907. * * *

(5) The decision of the court below is, moreover, in conflict with the decisions of the Supreme Court of Minnesota in *Ostby* v. *Salmon*, 177 Minn. 289, and *Koppe* v. *Pfefferle*, 188 Minn. 619. In these cases it was held that minors removed from this country to Canada, where their fathers, during the minors' infancy, were naturalized as British subjects, were not restored to American citizenship upon their return to Minnesota while minors and hence had no right to vote when they attained their majority.

(6) The question decided below is one which involves the construction of the Constitution as well as a treaty and statutes of the United States and obviously is one of general importance. The lack of uniformity resulting from the decision below, unless resolved by this Court, will necessarily make uncertain in future cases the procedure to be followed by the executive branch of the Government and will leave in doubt the status of a minor native-born citizen of the United States who has been invested with the citizenship of another country by the action of his or her father in becoming a cit-

izen of that other country. As is apparent from a letter from the Solicitor of Labor to the Attorney General dated October 18, 1938, which is printed as Appendix B (*infra*, p. 20), there are a large number of persons in the same situation as the respondent herein. This petition is submitted in order that the conflict in the relevant holdings may be resolved and an authoritative decision secured to govern the executive departments in the administration of the law. For the reasons stated, it is believed that a decision herein will be in the public interest.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

GERARD D. REILLY,
Solicitor, Department of Labor.

GREEN H. HACKWORTH,
Legal Adviser, Department of State.

NOVEMBER 1938.

APPENDIX A

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution as pertinent provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

Act of April 14, 1802, c. 28, 2 Stat. 153, as pertinent provides:

> *And be it further enacted,* That the children of persons duly naturalized under any of the laws of the United States * * * being under the age of twenty-one years, at the time of their parents being so naturalized * * * shall, if dwelling in the United States, be considered as citizens of the United States * * *.

Act of March 2, 1907, c. 2534, Sec. 2, 34 Stat. 1228 (U. S. C., Title 8, Sec. 17), provides:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.
>
> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said

years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

Articles I and III of the Convention between the United States of America and Sweden and Norway. Naturalization. Signed May 26, 1869; Ratified December 17, 1870; Exchanged June 14, 1871; Proclaimed January 12, 1872 (17 Stat. 809–810), provides:

ART. I

Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.

Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Sweden and Norway to be American citizens, and shall be treated as such * * *

ART. III

If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original

country and applies to be restored to his former citizenship, the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper.

Article III of the Protocol to the Convention between the United States of America and Sweden and Norway. Naturalization. Signed May 26, 1869; Ratified December 17, 1870; Exchanged June 14, 1871; Proclaimed January 12, 1872 (17 Stat. 812–13), provides:

> Relating to the third article of the convention.
>
> It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship.
>
> The intent not to return to America may be held to exist when the person so naturalized resides more than two years in Sweden or Norway.

Article VIII of the Swedish Law on the Acquisition and Loss of Citizenship, dated the 1st of October, 1894, as amended May 7, 1909, provides (Consular Statute Book of Sweden, 1910, pp. 2–3):

> Any one forfeiting his or her rights as a Swedish citizen in consequence of article 7, and not becoming a citizen of any other country regains those rights on again settling in Sweden, or if the King permits that the citizenship may be regained without so doing.
>
> If the King has entered into a convention with a foreign Government, that any person previously of Swedish nationality having acquired citizenship in that foreign country

shall be considered as having renounced such right when he again takes up his domicile in this Country and after he has been living here for a certain time; if any person for such reason loses his foreign citizenship, he regains his Swedish citizenship at the same time.

If in accordance with the above stipulations of this article Swedish right of citizenship has been regained by the husband and father, such right also accrues to his wife and legitimate children under age, unless in the case mentioned in the second part they neither are domiciled in this Country when citizenship is regained by the husband and father, nor have lost their citizenship in the foreign country together with him.

APPENDIX B

OCTOBER 18, 1938.

THE HONORABLE
THE ATTORNEY GENERAL.

MY DEAR MR. ATTORNEY GENERAL: For the information of your Department in connection with the case of Perkins et al. *v.* Elg, decided by the United States Court of Appeals for the District of Columbia, you are informed that the following is a statement of the cases which arose under the immigration laws involving persons who were native-born citizens of the United States, but whom this Department was obliged to treat as aliens and as subject to all the restrictive provisions of the Immigration Laws as the result of the decision of your Department in the case of Ingrid Therese Tobiassen (36 Ops. Atty. Gen. 535):

Number of persons who were arrested in the United States and deported therefrom	25
Number of persons involved in cases of the same character which are now pending awaiting final disposition	200
Number of persons who, upon appearing before, and making application to, the immigration authorities for admission to the United States were ordered excluded and deported therefrom	500
Number of persons involved in cases of the classification last described which are now pending awaiting final disposition	10

The foregoing statistics were compiled from a canvass actually made a year or two ago by the appropriate officials of the Immigration and Naturalization Service throughout the United States, its Territories, and the insular possessions in

which the immigration laws are administered by such officials. To those actual figures there were added an estimate of the approximate number of similar cases which arose since the canvass in question was made.

I trust that the information will be sufficient for the purposes for which it is desired.

Respectfully,

GERARD D. REILLY,
Solicitor of Labor.

EJG/gs

U. S. GOVERNMENT PRINTING OFFICE: 1939